FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 25 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1945.

No. 707.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Appellant,

vs.

GEORGE BENJAMIN, AS INSURANCE COMMISSIONNER OF THE STATE OF SOUTH CAROLINA,

Appellee.

BRIEF ON BEHALF OF THE STATES OF ALABAMA, INDIANA, KANSAS, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEW YORK, OHIO, OKLAHOMA AND TEXAS, AS AMICI CURIAE.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX.

Question presented 1
Summary of argument 2
Argument 3
I. United States v. South-Eastern Underwriters Association does not invalidate South Carolina premium tax laws 3
II. The premium tax laws of South Carolina are on intrastate business and not a burden on interstate commerce 6
III. South Carolina premium tax laws are not in violation of the Fourteenth Amendment or the Commerce Clause of the Constitution of the United States 16
IV. The effect of McCarren-Ferguson Act 20
Conclusion 44

Authorities Cited.

Allgeyer v. Louisiana, 165 U. S., 579 24
California v. Thompson, 313 U. S., 109, 85 L. Ed., 734 14
Cheney Bros. Co. v. Massachusetts, 246 U. S., 147 9
Clark Distilling Co. v. Western Maryland R. Co., 242 U. S., 311 32
Cloverleaf Butter Co. v. Patterson, 315 U. S., 148 27
Conn. Gen. Life v. Johnson, 303 U. S., 77 7

Connecticut General Life Insurance Co. v. Johnson, 303 U. S., 77 25
Compania Tobaccos v. Collector, 275 U. S., 87, 98 7
Cooley v. Port Wardens, 53 U. S., 299 27
Duckworth v. Arkansas, 314 U. S., 390, 86 L. Ed., 294. 14
Engle v. O'Mally, 219 U. S., 128 8
Equitable Life v. Pa., 238 U. S., 143 7
Finch v. McKittrick, 305 U. S., 395 43
Ford Motor Co. v. Beauchamp, 308 U. S., 331 ..... 9, 19
General Trading Co. v. State Tax Commission, 322 U. S., 335, 88 L. Ed., 1309 14
German Alliance Insurance Co. v. Kansas, 233 U. S., 389 34
Illinois Natural Gas Co. v. Central Illinois Publ. Service Co., 314 U. S., 498, 86 L. Ed., 371 14
In Re Insurance Cases, 161 Pac., 726 26
Indiana v. Prudential Ins. Co., 64 N. E., 150 ..... 12, 26, 45
Kentucky Whip & Collar Co. v. Illinois C. R. Co., 299 U. S., 334 35
Lincoln Life v. Read, 325 U. S., 673, 65 S. Ct., 1250 ..... 7, 16
Liverpool & London & Globe Ins. Co. v. Board of Assessors of Parish of Orleans, 221 U. S., 346 8
Metropolitan Life Ins. Co. v. New Orleans, 205 U. S., 395 8
McGoldrick v. Gulf Oil Corp., 309 U. S., 414 40
McGoldrick v. Berwind-White Coal Min. Co., 309 U. S., 33, 83 L. Ed., 585 ..... 14, 38, 40
Nelson v. Sears, Roebuck & Co., 312 U. S., 359 ..... 11, 18
Ozark Pipe Line v. Monier, 266 U. S., 555 41

Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U. S., 403 10
Parker v. Brown, 317 U. S., 341, 87 L. Ed., 315 14
Paul v. Virginia, 8 Wall., 168 ..... 3, 5
Polish National Alliance v. National Labor Relations Board, 322 U. S., 643 12
Safe Harbour Water Corp. v. Federal Power Commission, 124 F. (2d), 800 35
Southern Pac. Co. v. State of Arizona, 325 U. S., 761 13
South Carolina Highway Dept. v. Barnwell Bros., 303 U. S., 177, 82 L. Ed., 734 14
Southern Natural Gas Corp. v. Alabama, 301 U. S., 148 9
Southern Natural Gas Co. v. Alabama, 301 U. S., 148 19
Stone v. Interstate Natural Gas Co., 103 Fed. (2d), 544 19
State of Wisconsin v. J. C. Penny Co., 311 U. S., 435 18
St. Louis Compress Co. v. Ark., 260 U. S., 346 25
U. S. v. South-Eastern Underwriters Association, 322 U. S., 533 ..... 3, 5, 7, 8, 11, 26
Van Allen v. The Assessors, 70 U. S., 573 ..... 30, 39
Welton v. Missouri, 91 U. S., 275 42
West India Oil Co. v. Domenel, 311 U. S., 20 40
Wilkerson v. Rahrer, 140 U. S., 545 30
White & Prince v. Henniford, 305 U. S., 434 12
Whitfield v. Ohio, 297 U. S., 431 34

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 707.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Appellant,

vs.

GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA,

Appellee.

BRIEF ON BEHALF OF THE STATES OF ALABAMA, INDIANA, KANSAS, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEW YORK, OHIO, OKLAHOMA AND TEXAS, AS AMICI CURIAE.

THE QUESTION PRESENTED.

The sole question presented is whether the statutes of South Carolina, which impose a tax on the gross premiums received in such state by a foreign insurance company, contravene the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.

SUMMARY OF ARGUMENT.

I. The decision of this court in **United States v. South-Eastern Underwriters Association,** 322 U. S., 533, does not invalidate the South Carolina law in question or the laws of any state which exact from foreign insurance companies a tax on the premiums received by them from policies covering risks within such state.

II. The gross premium tax imposed upon foreign insurance companies by South Carolina and other states is for the privilege of entering such states and engaging in business therein, and is not levied on the interstate business of such companies and places no undue burden on interstate commerce.

III. The statutes in question, in that they impose a tax upon foreign insurance companies, without imposition of a like tax upon domestic insurance companies, are not in violation of the Fourteenth Amendment of the Constitution of the United States or the Commerce Clause of the Constitution of the United States.

(IV) By the enactment of the McCarran-Ferguson Act (Public Law 15, 79th Congress), the Congress of the United States clearly recognized the inherent power of the states to regulate and tax insurance companies and has openly approved all then existing state laws imposing taxes upon foreign insurance companies doing business within the several states.

ARGUMENT.

I.

THE DECISION OF THIS COURT IN UNITED STATES V. SOUTH-EASTERN UNDERWRITERS ASSOCIATION, 322 U. S., 533, DOES NOT INVALIDATE THE SOUTH CAROLINA LAW IN QUESTION OR THE LAWS OF ANY STATE WHICH EXACT FROM FOREIGN INSURANCE COMPANIES A TAX ON THE PREMIUMS RECEIVED BY THEM FROM POLICIES COVERING RISKS WITHIN SUCH STATE.

The appellant comes into this court challenging the right of the state of South Carolina to levy a tax on its total premium receipts in the state. With respect thereto, it is contended that, because of the decision in **United States v. South-Eastern Underwriters Association**, 322 U. S., 533, the appellant is engaged in interstate commerce and that **Paul v. Virginia**, 8 Wall., 168, in which it was held that the states have power to regulate or tax the business of insurance, was overruled by said decision.

An analysis of the court's opinion in **United States v. South-Eastern Underwriters Association, supra**, will disclose that said case in no way supports such contention. The issue presented therein raised but two questions which, as stated by Mr. Justice Black who delivered the majority opinion of the court, were (page 538):

> "(1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which ~~restrain~~ restrains or monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which

> stretch across state lines constitute 'commerce among the several states' so as to make them subject to regulation by Congress under the Commerce Clause?"

Therefore, since only the above questions were presented, the court's affirmative answer to each does not sustain appellant's position.

Pointing out the dire results which would follow if further restrictions were placed upon state power (which further restrictions appellant contends are now imposed upon the states), the court said (page 544):

> "• • • Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. • • •"

After stating that in order "to uphold insurance laws in other states, including tax laws, Paul v. Virginia's generalization and reasoning have been consistently adhered to," Mr. Justice Black made the following observation (page 545):

> "Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine congressional power under the Commerce Clause. • • •"

As a further indication of the court's attitude toward the exercise of state power, it is declared (page 547):

> "Another reason advanced to support the result of the cases which follow Paul v. Virginia has been that, if any aspects of the business of insurance be treated as interstate commerce, 'then all control over it is taken from the states and the legislative regulations which this court has heretofore sustained must be declared invalid.' Accepted without qualification, that broad statement is inconsistent with any decisions of this court. It is settled that, for constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting congressional action, the state regulatory and tax laws should be declared valid."

It is clear, therefore, that **Paul v. Virginia** was not overruled by **United States v. South-Eastern Underwriters Association** and that the decision in the latter case does not invalidate a state law that exacts from a foreign insurance company an excise tax imposed for the privilege of entering a state and doing business therein.

II.

THE GROSS PREMIUM TAX IMPOSED UPON FOREIGN INSURANCE COMPANIES BY SOUTH CAROLINA AND OTHER STATES IS FOR THE PRIVILEGE OF ENTERING SUCH STATES AND ENGAGING IN BUSINESS THEREIN, AND IS NOT LEVIED ON THE INTERSTATE BUSINESS OF SUCH COMPANIES AND PLACES NO UNDUE BURDEN ON INTERSTATE COMMERCE.

In addition to its interstate activities, the appellant is engaged in intrastate business in the various states in which it is engaged in business. That numerous transactions engaged in by the appellant in the state of South Carolina, as well as in other states, have a local situs and are intrastate in nature can scarcely be denied. The appellant generally maintains numerous bank accounts in the states in which it is qualified to do business, maintains and pays rent on a great number of offices in such states, employs a large number of agents, solicitors and other persons, solicits business, owns real estate, contracts with resident physicians, and generally carries on a profitable mortgage loan business within such states and, in connection with such activities, appellant has free access to the courts of the states for the purpose of enforcing its contracts and foreclosing its mortgages and defending actions and claims instituted against it. All of the above incidents of appellant's insurance business are purely local in character and appellant can not be

heard to complain of an imposition or an unjust discrimination.

Although this court held in **United States v. South Eastern Underwriters Association**, supra, that insurance companies which conducted a business across state lines were engaged in interstate commerce, it does not follow that the writing of policies of insurance on risks within a state by local representatives doing business in such state is in itself interstate commerce.

The tax in question, measured by gross premiums collected in the state of South Carolina, is for the privilege of entering the state to do ~~intrastate~~ interstate business and, consequently, does not restrict or interfere with appellant's use of the facilities of interstate commerce. The tax is not imposed on appellant's interstate activities. Its right to engage in intrastate business does not depend upon the payment of the South Carolina tax. While the tax, as stated, is measured by the gross premiums received by appellant on policies covering South Carolina risks, it must be borne in mind that it is an excise tax levied on the privilege of doing business in the state. The appellant voluntarily came into the state and requested that it be given the privilege to engage in business therein. This privilege was granted and is now exercised by the appellant.

As one of the conditions for doing business in the state appellant agreed to pay the premium tax imposed by the state statute. **Equitable Life v. Pa.**, 238 U. S., 143; **Compania Tobaccos v. Collector**, 275 U. S., 87, 98; **Conn. Gen. Life v. Johnson**, 303 U. S., 77; **Lincoln National Life v. Read**, 325 U. S. 673, 65 S. Ct., 1250. Therefore, since

the tax is an excise on the privilege of doing business in the state and on the business done by appellant in the state, it does in no manner interfere with, nor can it be a burden on, interstate commerce. The state of South Carolina has always had the right to lay and collect a tax on foreign insurance companies for the privilege of doing business in the state and such right remains unimpaired and unaffected by the decision of this court in **United States v. South-Eastern Underwriters Association.**

The fallacy of appellant's contention that it is engaged solely in interstate commerce becomes at once apparent in light of former decisions of this court.

In **Metropolitan Life Ins. Co. v. New Orleans** (1907), 205 U. S., 395, policy loans of a New York insurance company in Louisiana were held to have a taxable situs for property taxes in Louisiana. In **Engle v. O'Mally** (1911), 219 U. S., 128, the receipt of a deposit and subsequent transmission of money were held to be independent of each other and the former not interstate commerce. In **Liverpool & London & Globe Ins. Co. v. Board of Assessors of Parish of Orleans** (1911), 221 U. S., 346, credits on insurance premiums extended for thirty (30) to sixty (60) days without notes evidencing the credits were assessed for taxation. On challenge of the taxes so assessed by the insurance company, the court said at page 354:

> "* * * The credits would have no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; * * *."

and at page 357:

"• • • They were none the less enforceable credits arising in the local business."

In **Cheney Bros. Co. v. Massachusetts** (1918), 246 U. S., 147, a consolidated case involving a privilege tax upon foreign corporations, the activities of a number of corporations were considered. Some activities deemed local were keeping a stock of repair parts in Massachusetts; repairing cars and selling secondhand cars in Massachusetts; the employment of salesmen who solicited retail orders in Massachusetts; holding directors' meetings and keeping corporate records in Massachusetts; depositing money and paying it out of a bank in Massachusetts.

In **Southern Natural Gas Corp. v. Alabama** (1937), 301 U. S., 148, an annual franchise tax was imposed upon a foreign corporation which the corporation claimed would be a burden on interstate commerce. The Alabama court had construed the tax as a tax on the right to exercise corporation functions in the state. It was found that some local business was carried on by the company. The court there said (page 157):

"• • • There is no showing of any direct burden upon interstate commerce, the effect upon that commerce being incidental and remote, not differing in this respect from the effect of ordinary **ad valorem** taxation of property within the state. • • •"

Ford Motor Co. v. Beauchamp (1939), 308 U. S., 331, involved a franchise tax which the Ford Motor Company claimed was a tax upon assets used in interstate business. The court, after holding the tax a privilege tax, said at page 334:

"* * * The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. * * *".

And at page 336:

"* * * The constitution recognizes the dual interests of the national and state governments and permits taxes for local privileges upon the intrastate activities of the farflung enterprises which gain large benefits from the nationwide market, protected by the commerce clause. We reject petitioner's contention that constitutionality of state taxation turns on so narrow an issue as whether local assets rather than local gross receipts are used in a taxing formula."

Again, in **Pacific Telephone & Telegraph Co. v. Tax Commission** (1936), 297 U. S., 403, the statute imposed an occupational tax measured by the gross receipts from intrastate business. It was there claimed that all facilities were used in interstate business, that it was impossible to segregate them as to the telephone and telegraph company, so the tax was a burden on interstate commerce. The court said (page 413):

"In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an **ad valorem** property tax upon tangible property used exclusively in such business. Each increases the necessary cost of doing the local business. Either might conceivably be so large as to render the local business immediately unprofitable. A common carrier can not be compelled to carry on business indefinitely at a loss. * * * If, because of such loss, a corporation, seeing no prospect of betterment, wished to discontinue its local business and

were prevented by law from doing so unless it discontinued also its interstate business, the law might be held void as imposing an unconstitutional condition upon the privilege of engaging in interstate commerce. * * * If it was the tax which caused the unprofitableness of the local business and, consequently, the desire to discontinue it, the tax would then appear as a direct burden on interstate commerce. * * * **But no reason has been suggested why a tax upon the local business should be held void, if despite its burden, the local business is conducted at a profit;** * * *." (Emphasis ours.)

In the instant case there is nothing to prevent appellant or any foreign insurance company from terminating its local business and conducting a national insurance business by mail without local taxation or license.

In **Nelson v. Sears, Roebuck & Co.**, 312 U. S., 359, the requirement that Sears, Roebuck & Co. pay Iowa a use tax upon its mail orders although those mail orders were filled in Illinois was claimed a burden on interstate commerce because other out of state mail order houses which maintained no stores in Iowa need not collect the use tax. The court answered that contention shortly by saying (page 365):

"* * * But those other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price * * *."

A clear indication that this court in **United States v. South-Eastern Underwriters Association** did not declare invalid all state statutes levying a tax on the privilege of engaging in the business of insurance in a state is the

case of **Polish National Alliance v. National Labor Relations Board**, 322 U. S., 643, wherein it was declared by Mr. Justice Frankfurter, who delivered the opinion of the court (page 649):

> "* * * The long series of insurance cases that have come to this court for more than seventy-five years, from Paul v. Virginia, 8 Wall. (U. S.), 168, 19 L. Ed., 357, to New York L. Ins. Co. v. Deer Lodge County, 231 U. S., 495, 58 L. Ed., 332, 34 S. Ct., 167, have invariably involved some exercise of state power resisted, in most instances, on the claim that it was impliedly forbidden by the Commerce Clause. Such was the context in which this court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business of insurance is in effect merely a congeries of contracts, the states may, for taxing and diverse other purposes, regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause. Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the constitution or different exertions of power under it. Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation. Compare, for example, Heisler v. Thomas Colliery Co., 260 U. S., 245, 67 L. Ed., 237, 43 S. Ct., 83, with Sunshine Anthracite Coal Co. v. Atkins, 310 U. S., 381, 84 L. Ed., 1263, 60 S. Ct., 907."

It was said by the Supreme Court in **State of Indiana v. Prudential Insurance Co.**, 64 N. E. (2d), 150, decided December 21, 1945, that assuming that the overall pattern of the business done by most large insurance companies is interstate:

"The question is whether all activities of such a corporation are interstate and what rights the states have to regulate and tax the local aspects and activities of the business. The trend of the more recent decisions of the Supreme Court favors the states in this respect. Even the **South-Eastern Underwriters Association** opinion indicates that local activities, **even though tied into interstate business**, may be regulated and taxed by the states. **So it seems that the case that has created the doubt itself goes far to dispel the doubt**, and, as respects local phases and aspects of the business, is in line with the trend toward greater liberality for state regulation and taxation of some phases of interstate commerce.

As we have already pointed out, the Supreme Court held in the **Polish National Alliance case, supra**, that 'federal regulation does not preclude state taxation and state taxation does not preclude federal regulation.' In **Cloverleaf Butter Co. v. Patterson** (1943), 315 U. S., 148, 155, 156, 86 L. Ed., 754, 62 S. Ct., 491, the same idea is amplified in the following language:

'It has long been recognized that in those fields of commerce **where national uniformity is not essential**, either the state or federal government may act. **Willson v. Black Bird Creek Marsh Co.**, 2 Pet. (U. S.), 245, 7 L. Ed., 412; **California v. Thompson**, 313 U. S., 109, 114, 85 L. Ed., 1219, 1221, 61 S. Ct., 930. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of commerce which are left unregulated by the nation * * *.'"

In the case of **Southern Pac. Co. v. State of Arizona** (1945), 325 U. S., 761, decided by this court on June 18, 1945, the following language was used:

"**Although the Commerce Clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation.** Ever since **Wilson v. Black-Bird Creek Marsh Co.**, 2 Pet., 245, 7 L. Ed., 412, and **Cooley v. Board of Wardens**, 12 How., 299, 13 L. Ed., 996, it has been recognized that, **in the absence of conflicting legislation by Congress**, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. (Citing cases.)"

To the same effect, that the State may tax and regulate interstate commerce if they do not unduly burden it, see the cases of **General Trading Co. v. State Tax Commission** (1944), 322 U. S., 335, 88 L. Ed., 1309; **Parker v. Brown** (1943), 317 U. S., 341, 87 L. Ed., 315; **Illinois Natural Gas Co. v. Central Illinois Publ. Service Co.** (1942), 314 U. S., 498, 86 L. Ed., 371; **South Carolina Highway Dept. v. Barnwell Bros.** (1938), 303 U. S., 177, 82 L. Ed., 734; **California v. Thompson** (1941), 313 U. S., 109, 85 L. Ed., 1219; **Duckworth v. Arkansas** (1941), 314 U. S., 390, 86 L. Ed., 294. **McGoldrick v. Berwind-White Coal Min. Co.** (1940), 309 U. S., 33, 83 L. Ed., 585.

Considering that certain important phases of the insurance business are done within the state, that portion of the business which is interstate commerce can, under the decisions previously rendered by this court, be made to "pay its way" in the form of taxes to the states. In the case of **McGoldrick v. Berwind-White Coal Min. Co.**, 309 U. S., 33, the court sustained a New York sales tax statute as applying to coal mining in interstate commerce, Mr. Justice Stone saying (page 46):

"But it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau of Revenue, 303 U. S., 250, 254, 82 L. Ed., 823, 826, 58 S. Ct., 546, 115 A. L. R., 944. Not all state taxation is to be condemned because, in some manner it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress."

and again on page 49, he says:

"If, as guides to decisions we look to the purpose of the Commerce Clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of congressional action, the Commerce Clause forbids."

The foregoing, we respectfully submit, should put to rest any argument in which it is contended that the decision of this court, in United States v. South-Eastern Underwriters Association invalidates the South Carolina taxing statutes in question and those of the other states under which a premium tax is levied against foreign corporations on the privilege of engaging in the business of insurance within the state.

III.

THE STATUTES IN QUESTION, IN THAT THEY IMPOSE A TAX UPON FOREIGN INSURANCE COMPANIES, WITHOUT IMPOSITION OF A LIKE TAX UPON DOMESTIC INSURANCE COMPANIES ARE NOT IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

It is claimed that the levy of the tax in question without the imposition of a like tax upon domestic companies operates to deny appellant the equal protection of laws under the Fourteenth Amendment to the Constitution of the United States.

It is indeed difficult to perceive how such contention can at this time be seriously advocated, in light of the recent decision of this court in **Lincoln National Life Insurance Co. v. Read**, supra, decided June 11, 1945. The appellant in said case, an Indiana insurance company, attacked the constitutionality of the Oklahoma statute which imposes a gross premium tax on foreign insurance companies and none on domestic companies. In the court's opinion, delivered by Mr. Justice Douglas, it is stated:

> "It has been held both before and after the Fourteenth Amendment that a state may impose on a foreign corporation for the privilege of doing business within its borders more onerous conditions

than it imposes on domestic companies. Paul v. Virginia, 8 Wall. (U. S.), 168, 19 L. Ed., 357; Ducat v. Chicago, 10 Wall. (U. S.), 19 L. Ed., 962; Fire Asso. of Phila. v. New York, 119 U. S., 110, 30 L. Ed., 342, 7 S. Ct., 108. But it is said that a state may not impose an unconstitutional condition — that is it may not exact as a condition an infringement or sacrifice of the rights secured to the corporation by the Constitution of the United States. The argument apparently is that since appellant is entitled to the equal protection of the laws, a condition cannot be imposed which results in its unequal and discriminatory treatment.

But that argument proves too much. If it were adopted, then the long established rule that a state may discriminate against foreign corporations by admitting them under more onerous conditions than it exacts from domestic companies would go into the discard. Moreover, it has never been held that a state may not exact from a foreign corporation as a condition to admission to do business the payment of a tax measured by the business done within its borders. See Continental Assur. Co. v. Tennessee, 311 U. S., 5, 85 L. Ed., 5, 61 S. Ct., 1. That was the nature of the tax imposed in Fire Asso. of Phila. v. New York, supra. That company was licensed to do business in New York under a law which required it to pay such a tax as its home state might impose on New York companies doing business there. After it had qualified to business in New York its home state exacted from foreign corporations a tax of 3 per cent on premiums received in that state. New York accordingly followed suit. The court sustained the increased tax, saying that since the license of the foreign company was subject to the conditions prescribed by the New York statute, the amount of the tax could at any time be increased for the future. "The state, having the power to exclude entirely, has the power to change

the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given.' 119 U. S., p. 119, 30 L. Ed., 347, 7 S. Ct., 108. And the equal protection clause does not require the tax or rate of tax exacted from a foreign corporation as a condition of entry to be the same as that imposed on domestic corporations. Hanover F. Ins. Co. v. Harding (Hanover F. Ins. Co. v. Carr), supra (272 U. S., pp. 510, 511, 71 L. Ed., 380, 381, 47 S. Ct., 179, 49 A. L. R., 713)."

The above case, even though it was not contended by the appellant therein that it was engaged in interstate commerce, is clearly and completely dispositive of the question of discrimination under the Fourteenth Amendment.

It is also claimed that the levy of this tax without the imposition of a like tax upon domestic companies, contravenes the Commerce Clause of the Constitution. But appellant was not satisfied to stand upon its federal right and do solely an interstate business. It sought a permit or franchise to carry on a local business within the state and South Carolina had the right to levy a tax for this privilege. Since the tax was not upon the privilege of doing interstate business but was a price charged for the permit to carry on a local business, it was not a direct burden upon interstate commerce. **Nelson v. Sears, Roebuck & Company**, supra; **State of Wisconsin v. J. C. Penney Company**, 311 U. S. 435 (1940); **Ford Motor Com-**

pany v. Beauchamp, supra; Southern Natural Gas Co. v. Alabama, 301 U. S. 148 (1937); Stone v. Interstate Natural Gas Co., 103 Fed. (2d), 544 (C. C. A. 5th, 1939), affirmed 308 U. S., 522.

It is, therefore, respectfully submitted that since a large share of the business conducted by the appellant in the state of South Carolina, as in other states foreign to its domicile, is purely local, the premium tax laid by such states on the privilege of engaging in the insurance business therein is not in violation of either the equal protection clause of the Fourteenth Amendment or the Commerce Clause of the Constitution of the United States and can not be regarded as an undue burden on interstate commerce.

IV.

BY THE ENACTMENT OF THE McCARRAN-FERGUSON ACT (PUBLIC LAW 15, 79TH CONGRESS), THE CONGRESS OF THE UNITED STATES CLEARLY RECOGNIZED THE INHERENT POWER OF THE STATES TO REGULATE AND TAX INSURANCE COMPANIES AND HAS OPENLY APPROVED ALL THEN EXISTING STATE LAWS IMPOSING TAXES UPON FOREIGN INSURANCE COMPANIES DOING BUSINESS WITHIN THE SEVERAL STATES.

There can be no substantial question of the intent of Congress in passing the McCarran-Ferguson Act. This bill was enacted at a time when Congress was being besieged with requests to clarify the status of state tax and regulatory laws with reference to insurance companies shortly after the southeastern decision of this court in U. S. v. Southeastern Underwriters Association. Congress was well aware of the condition of state tax laws. It exercised its right to regulate interstate phases and aspects of the insurance business by authorizing the states to continue their regulation and taxation of such business in the manner developed through 75 years of experience by the enactment of Public Law 15, approved March 9, 1945 (1945 U. S. Code, Service No. 2, page 31).

Said act is entitled "An act to express the intent of the Congress with reference to the regulation of the business of insurance." It specifically declares "that the con-

tinued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states."

Section 2(a) provides that "The business of insurance, * * * shall be subject to the laws of the several states which relate to the * * * taxation of such business." The laws of the several states which relate to the taxation of insurance are the very laws here under attack. The reference of the Congress is expressly to these same laws.

Section 2(b) states that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically relates to the business of insurance." Here again the Congress is referring to the very laws challenged by the appellant.

In the report of the Senate Committee on the Judiciary (Senate Report No. 15, January 24, 1945), the conclusion is made:

> "Enactment of this bill will (1) remove existing doubts as to the right of the states to regulate and tax the business of insurance, and (2) secure more adequate regulation of such business."

In the report of the House Committee on the Judiciary (House report No. 143, February 13, 1945), the following comments are made:

> "Enactment of this bill will (1) remove existing doubts as to the right of the states to regulate and tax the business of insurance, and (2) secure more adequate regulation of such business."

In the report of the House Committee on the Judiciary (House Report No. 143, February 13, 1945), the following comments are made:

"General Statement.

From its beginning, the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several states. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years, leading to the generally accepted doctrine that the business of insurance was not subject to federal law.

On June 5, 1944, in the case of **U. S. v. Southeastern Underwriters Association**, et al., the Supreme Court decided that the business of insurance was commerce and, therefore, subject to the Sherman Act of July 2, 1890, as amended, and the Clayton Act of October 15, 1914, as amended.

* * * * * * * * *

Inevitable uncertainties which followed the handing down of the decision in the Southeastern Underwriters Association case, with respect to the constitutionality of state laws, have raised questions in the minds of insurance executives, state insurance officials, and others as to the validity of state tax laws, as well as state regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective states. Already many insurance companies have refused, while others have threatened refusal to comply with state tax laws, as well as with other state regulations, on the ground that to do so, when such laws

may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the Southeastern Underwriters case, will subject insurance executives to both civil and criminal actions for misappropriation of company funds.

The committee has therefore given immediate consideration to S. 340, together with a similar measure, H. R. 1973, so that the several states may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several states, and thus enables insurance companies to comply with state laws. * * *

* * * * * * * * * *

It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance **beyond** that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the states, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in **Allgeyer v. Louisiana** (165 U. S., 578). **St. Louis Cotton Compress Co. v. Arkansas** (260 U. S., 346) and the **Connecticut General Insurance Co. v. Johnson** (303 U. S., 77), which hold, **inter alia**, that a state does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the state or to regulate such transactions in any way.

Purpose of the Bill.

The purpose of the bill is twofold: (1) To declare that the continued regulation and taxation by the several states of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the states by suspend-

ing the application of the Sherman and Clayton Acts for approximately two sessions of the state legislatures, so that the states and the Congress may consider legislation during that period.

Enactment of this bill will (1) **remove existing doubts as to the right of the states to regulate and tax the business of insurance**, and (2) to secure more adequate regulation of such business.". (Our emphasis.)

As a matter of logic and common sense, the language of the report would seem capable of only one interpretation: The power of the states to regulate and tax the business of insurance is to continue to the full extent to which it had been held to exist prior to the Southeastern Underwriters decision. The three Supreme Court decisions specified in the "general statement" are enumerated to illustrate what Congress conceived to be the existing valid limitations to state regulation and control which it intended to preserve. It plainly intended to recognize no further limitations.

In **Allgeyer v. Louisiana** (1897), 165 U. S., 579, defendant had secured a policy of marine insurance from a New York company not admitted to do business in Louisiana. The policy was in the nature of an open policy and required defendant to notify the company by mail upon each shipment to be covered. It was admitted the policy was contracted in New York and there was no claim that the insurance company was violating any Louisiana law. Defendant was charged, in giving a notice by mail from Louisiana as to one shipment, with violating a Louisiana statute which made it a crime to do any act in

Louisiana to effect insurance or property therein with a marine company not admitted to Louisiana. The court said the contract being valid since the state had no jurisdiction to prevent its citizens from entering into a valid contract beyond the state, the defendant under the Fourteenth Amendment to the Federal Constitution was guaranteed the liberty to give the notification required by the contract.

In **St. Louis Compress Co. v. Ark.** (1922), 260 U. S., 346, it was held that Arkansas could not tax the defendant upon a policy contracted for, delivered and paid for in Missouri upon defendant's property in Arkansas where no transactions occurred in Arkansas.

In **Connecticut General Life Insurance Co. v. Johnson** (1938), 303 U. S., 77, California taxed the insurance company upon premiums for reinsurance contracts entered into in Connecticut by the plaintiff with other companies on their California business. The reinsurance contracts called for no act in California and involved no relationship between plaintiff and those originally insured. The court said there was no privilege conferred by California in such transactions and California had no jurisdiction to tax. The principles involved in those cases are largely due process.

In the debate in the Senate preceding the passage of the bill, Senator Joseph C. O'Mahoney was the final speaker. He made this unchallenged statement before the vote was taken:

> "We are extending to the states, complete immunity for their state tax law, * * *." 91 Cong. Rec., 509.

Senator Ferguson also stated that:

> "The language of the bill makes clear the purpose of the legislation, that the taxation problem will be taken care of, and there will be no excuse for **paying under protest** or not paying at all." Vol. 91, No. 15, p. 504. (Our emphasis.)

In the case of **State of Indiana v. The Prudential Insurance Company**, supra, and **In Re Insurance Cases**, Supreme Court of Kansas, 161 Pac. (2d), 726, and also in **Prudential Insurance Co. v. Forbes**, decided August 21, 1945, by the Circuit Court of Ingham county, Michigan, it was held that the intention of Congress was to permit the continued enforcement of the tax laws as they existed prior to and at the time of the Southeastern Underwriters decision.

B. Congress Has Power to Authorize the States to Continue the Taxation of the Insurance Business as Judicially Sanctioned Prior to the Southeastern Decision.

We shall proceed to consider the power of Congress to authorize the continued taxation of the insurance business by the states as judicially sanctioned prior to the Southeastern decision. While, as hereinbefore shown, the state statutes taxing foreign insurance companies are not invalidated by the decision of this court in **U. S. v. South-Eastern Underwriters Association**, there is no question but that it was nevertheless clearly within the competency of Congress to pass the McCarran Act. In other words if Congress out of abundance of caution felt

impelled to pass a law which expressly sanctioned a tax laid on foreign insurance companies by the states, it was clearly within the domain of that body to do so. This power has been exercised on several occasions and with regard to various subjects of interstate commerce. It has been manifested in a number of different forms; it has been litigated at different times and on different aspects, without exception it has been sustained.

A recent statement of the Supreme Court of the United States is found in **Cloverleaf Butter Co. v. Patterson** (1942), 315 U. S., 148, where the court said (page 155):

> "Where the federal legislation **authorizes** state action, such state action is permissible **even as to matters which could otherwise be regulated only by uniform national enactments. In Re Rahrer (Wilkerson v. Rahrer)**, 140 U. S., 545, 561; **Clark Distilling Co. v. Western Maryland Ry. Co.**, 242 U. S., 311, 325 et seq.; **Whitfield v. Ohio**, 297 U. S., 431; **Kentucky Whip & Collar Co. v. Illinois Central R. Co.**, 299 U. S., 334, 350."

The principle that Congress may authorize state control over interstate commerce was first announced in **Cooley v. Port Wardens** (1851), 53 U. S., 299, which involved the validity of a Pennsylvania state tax imposed on vessels sailing from Philadelphia to any port not within the Delaware River without a pilot, where a pilot was available. In 1789 Congress had enacted a law providing that all pilots in the rivers and harbors of the United States should continue to be regulated in conformity with the existing laws of the state until further legislative provisions should be made by Congress. The Pennsylvania statute was passed subsequent to the fed

eral act and its validity therefore could not be sustained on the theory that Congress had merely adopted the state laws as its own. It was conceded that while the regulation of pilots had always been regarded as a local matter (as has the business of insurance) not requiring uniform regulations, Congress nevertheless had the power to regulate it under the commerce clause. The question was whether it could permit regulation by the states. It was said (page 317):

> "If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the states that power. And yet this Act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a state acting in its legislative capacity, can be deemed a law, enacted by a state; and if the state has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did **per se** deprive the states of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded it must be because the nature

of the power, thus granted to Congress, requires that a similar authority should not exist in the states. If it were conceded on the one side, that the nature of this power like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to the Congress, as effectually and perfectly excludes the states from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, and after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulation. **Sturges v. Crowninshield**, 4 Wheat., 193; **Moore v. Houston**, 5 Id., 1; **Wilson v. Black Bird Creek Co.**, 2 Pet., 251.

* * * * * * * * *

Viewed in this light, so much of this Act of 1789 as declares that pilots shall continue to be regulated 'by such laws as the states may respectively hereafter enact for that purpose,' instead of being held to be inoperative, as an attempt to confer on the states a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. **It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation.** * * *

> It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. * * *." (Our emphasis.)

In the case of state taxation of the insurance business, the Congress has recognized that "the nature of this subject is not such as to require its exclusive legislation."

An analogous situation arose in **Van Allen v. The Assessors** (1865), 70 U. S., 573, involving state taxation of a national banking association created under an Act of Congress. The national banking act as amended in 1864 had provided for state taxation of those shares. However, it was contended by the shareholders that since all of the capital in the bank invested in stock and bonds of the United States, the shares of bank stock could not be taxed and it was said that Congress possessed no power to confer upon the state authority to tax which had been delegated to Congress by the Constitution. The court said at page 585:

> "* * * We agree to this. But as it respects a subject-matter over which Congress and the states may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the states, there is no doubt Congress may withhold the exercise of that authority and leave the states free to act. * * *"

Wilkerson v. Rahrer (In Re Rahrer) (1891), 140 U. S., 545, marks the next development of the principle.

The Wilson Act provided that the sale of liquor shipped in interstate commerce should be subject to the law of the state into which it was shipped, notwithstanding that the original package remained unbroken. It was contended that the act was invalid because it purported to delegate the powers of Congress to the states. The court conceded that a delegation of federal power to the states could not be valid but held that a federal statute permitting state laws to operate, notwithstanding the complete power of Congress to occupy the field, did not constitute a delegation of federal power. The court said (page 560):

> "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a state. This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the manner of interstate commerce, operates **ex proprio vigore** as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the state. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the states in all things, and that not only may intoxicating liquors be imported from one state into another without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result.
>
> * * * * * * * *
>
> No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.
>
> * * * * * * * *

> The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge. The manner of that disposition brought into determination upon this record involves no ground for adjudging the act of Congress inoperative and void.
>
> * * * * * * * *
>
> Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

Clark Distilling Co. v. Western Maryland R. Co. (1917), 242 U. S., 311, involved the validity of the Webb-Kenyon Act, which, going a step beyond the Wilson Act, prohibited the shipment of intoxicating liquor into any state whose law prohibited the sale of liquor. It was argued that Congress could permit state regulation only as to subjects which required no uniformity of state action and which the states were therefore free to regulate if Congress remained silent, and that as to subject where uniformity would be required Congress is wholly without power to provide for the application of state power to any degree whatever, because in the absence of federal legislation, the subject-matter would be free from state control. The court said (page 328):

> "* * * But granting the accuracy of the two classifications which the proposition states, **the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support**

in the authority relied upon to sustain it. . . . (Emphasis ours.)

. . . . . .

Before concluding we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control and therefore destroys the Constitution. **The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected.** The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace." (Our emphasis.)

The language last quoted suggests the only limitation on the doctrine under consideration if any exists, namely, that the subject matter be one peculiarly subject to the regulatory powers of the state when state commerce is not involved. That the business of insurance falls within

this category has not been doubted for many years. The existence of such power in the states was upheld in **German Alliance Insurance Company v. Kansas** (1914), 233 U. S., 389, in which the court referred to the widespread recognition of the need for regulation of the insurance business. That the business has been recognized for more than seventy-five years as local (and subject to local tax and regulatory statutes) clearly differentiates it from the business of dealing in ordinary commodities and it is wholly unnecessary to consider the power of Congress to permit state taxation and regulation of the latter. The long history of local regulation of the insurance business also demonstrates a lack of necessity for uniform regulation but under the rule laid down in the foregoing case even if it might otherwise be thought that uniform regulation were necessary, Congress may dispense with uniformity by consenting to state action.

In **Whitfield v. Ohio** (1936), 297 U. S., 431, the same principle was applied to uphold the Hawes-Cooper Act providing that goods manufactured by convicts and transported into another state should be subject to the laws of such state to the same extent as though manufactured there. The court pointed out that such legislation proceeds upon the view that free labor properly compensated cannot compete successfully with convict labor and that Congress had the power to, and had by the act, removed the impediment to state control which would otherwise have existed because of the interstate shipment. It was said (page 440):

> "If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question

which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act. * * *" (Emphasis ours.)

Kentucky Whip & Collar Co. v. Illinois C. R. Co. (1937), 299 U. S., 334, involved the validity of the Ashurst-Summers Act with reference to convict-made goods. This differed from the Hawes-Cooper Act in the same way that the Webb-Kenyon Act differed from the Wilson Act with reference to intoxicating liquors, making it unlawful to transport the goods into a state where they were intended to be received, possessed, sold or used in violation of state law. The court said (page 351):

"* * * The pertinent point is that where the subject of commerce is one as to which the power of the state may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees **fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy.**

In the congressional action there is nothing arbitrary or capricious bringing the statute into collision with the requirements of due process of law. The Congress in exercising the power confided to it by the Constitution is as free as the states to recognize the fundamental interests of free labor. Nor has the Congress attempted to delegate its authority to the states. The Congress has not sought to exercise a power not granted or to usurp the police powers of the states. It has not acted on any assumption of a power enlarged by virtue of state action. The Congress has exercised its plenary power,

which is subject to no limitation other than that which is found in the Constitution itself. The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection." (Emphasis ours.)

Neither is there anything arbitrary or capricious in a determination that the national interest is best served by permitting the states to continue functions with reference to the business of insurance in the same manner and to the same extent as they had for more than seventy-five years prior to June 5, 1944, with the uniform approval of the decisions of the Supreme Court.

A further exercise of the power of Congress to consent to state regulation was upheld in **Safe Harbour Water Power Corp. v. Federal Power Commission** (C. C., 93, 1941), 124 F. (2d), 800, cert. den. 316 U. S., 663. There the court upheld Section 20 of Part I of the Federal Power Act providing that jurisdiction of hydro-electric power rates in interstate commerce was lodged in the Federal Power Commission only where the states directly involved had not provided a commission or other authority to regulate rates or had been unable through their properly constituted authorities to agree on the rates. The validity of this provision was attacked on the ground that Congress had no power to consent to the fixing of rates in interstate commerce by state commissions and agencies, and sustained. It was said (page 806):

"We conclude that it was the intention of Congress to regulate hydro-electric power by state com-

missions using the federal agency set up in Section 20 only where the state commissions did not or could not perform the function expected of them.

Could Congress provide for the regulation of hydro-electric power coming into the states in interstate commerce by state commissions? * * * .

There is no doubt that Congress cannot delegate the power of the central government to regulate interstate commerce to a state or state agency. It should also be borne in mind that in the case at bar we need not concern ourselves with the doctrine of the silence of Congress for Congress has spoken in Section 20. When Congress enacted Section 20 in 1920 it had before it the decision of the Supreme Court in the Pennsylvania Gas Co. case. When Congress reenacted the section in 1935, the Supreme Court had decided not only **State of Missouri v. Kansas Natural Gas Co.**, 265 U. S., 298, 44 S. Ct., 544, 68 L. Ed., 1027, but the Attleboro case as well. **But there always has been a field where, Congress permitting, the police powers of the states might operate. Examples of this are manifold.** This has been true in many cases even where state action apparently has been in conflict with congressional action and the Supreme Court has held none the less that there remains a regulatory field in which the state may act. A cogent illustration lies in the decision of the Supreme Court in **Clark Distilling Co. v. Western Md. Ry. Co.**, 242 U. S., 311, 325-332, 37 S. Ct., 180, 61 L. Ed., 326, L. R. A. 1917B, 1218 Ann. Cas. 1917B, 845, passing upon the application of the Webb-Kenyon Law, 37 Stat., 699, 27 U. S. C. A., Section 122, which held in effect that Congress might throw an interstate shipment of infoxicating liquors into interstate commerce as it passed the state line, the use to which the shipment was then to be put becoming a matter of local concern and the police power of West Virginia operating in respect to it. There is an analogy between the Clark Distilling case and that at bar for the consumption of

power is a local matter, almost as if a package of power had been delivered at the state line. **The case at bar, however, is a stronger case for the exercise of state police power for in the instant case Congress has spoken and specifically has given permission for the exercise of state power. There is a field in which state power may act upon the products of interstate commerce and though that field is difficult to delimit we think that Congress intended to base Section 20 upon it and could do so without violation of the commerce clause of the Constitution** * * *" (Emphasis ours.)

An attempt may be made to distinguish between the power of Congress to permit **state regulation** of the insurance business as in the past, and the power to permit **state taxation** as it existed before the Southeastern case.

A brief consideration of the principle on which state tax statutes have been invalidated as burdening interstate commerce demonstrates that there is no merit in such an attempted distinction. As heretofore recognized, the Commerce Clause vests in Congress the right to regulate interstate commerce, and the vesting of such right in Congress by the Constitution necessarily deprives the state of the power to infringe the authority of Congress. Consequently, taxes which impose undue burdens on interstate commerce ordinarily amount to a regulation by the state of interstate commerce which "infringes the authority conferred upon Congress." But, as stated by the Supreme Court of the United States in **McGoldrick v. Berwind-White Company**, supra: "It is only when the tax operates to **regulate** commerce between the states * * * **to an extent which infringes the author-**

ity conferred upon Congress that the tax can be said to exceed constitutional limitations." Hence, state tax laws have been held to exceed constitutional limitations not because they imposed taxes on interstate commerce but because they operated to regulate interstate commerce to an extent which infringed the authority of Congress. It necessarily follows that wherever Congress has the power to authorize state regulation by withdrawing any impediment which the Commerce Clause would impose in the absence of such authority, there can be no valid contention that state taxation of the subject matter operates to regulate commerce to an extent which "infringes the authority conferred upon Congress." Consequently it may withdraw the impediment to the exercise by the state of the taxing power to precisely the same extent that it may withdraw the impediment to the exercise by the state of its regulatory power. The two principles go hand in hand and there can be no sound principle which would support the right of Congress to authorize state regulation which would otherwise be prevented by the Commerce Clause and at the same time deny the right to authorize state taxation which would otherwise be prevented by the Commerce Clause. No specific decision has been cited in which the principle of congressional authorization was applied to state taxation where the question of interstate commerce was involved, although the same principle was applied in **Van Allen v. The Assessors**, 70 U. S., 5, 73, with reference to the power of Congress to authorize state taxation of federal instrumentalities which otherwise could not be taxed by the states without the consent of Congress.

But while cases involving territories are not completely analogous, a compelling indication of judicial thought with respect to congressional consent to taxation of interstate or foreign commerce is found in **Inter-Island Co. v. Hawaii** (1938), 305 U. S., 306. Petitioner then complained of a tax upon it levied under the Hawaiian Utilities Act of 1913 which had been approved by Congress. It was claimed that the tax burdened interstate and foreign commerce. The court said at page 313 as one of the grounds of the decision:

> "Under the Constitution, Congress has the power to regulate interstate commerce. Therefore, assuming—but not deciding—that petitioner is engaged in interstate and foreign commerce, Congress has exercised its power in the present case by permitting the Territory to act upon this commerce by the imposition of the contested taxes. The imposition of these taxes under an act of Congress expressly subjected petitioner does not violate the Commerce Clause."

And compare **McGoldrick v. Gulf Oil Corp.** (1939), 309 U. S. 414, with **West India Oil Co. v. Dommel** (1940), 311 U. S., 20. In the first case, the New York sales tax levied in **McGoldrick v. Berwind White Coal Co.** was held an unconstitutional burden on commerce as applied to crude oil imported in bond under the provisions of the Tariff Act of 1930 and of the Revenue Act of 1932.

In the second case the Puerto Rican sales tax was held applicable to importations of fuel oil in bond under the same federal acts because an amendment to the Organic Act of Puerto Rico permitted such taxation. The purpose of that amendment was said to be a removal of the

original package impediment to territorial taxation. The tax was sustained.

If the tax could be sustained in the last case, because of congressional consent in spite of federal legislation involving the same subject under the Tariff and Revenue Acts and upon an article inherently exempt from local taxation, **a fortiori** the tax should be sustained in the case at bar.

In **Prudential Insurance Company v. Forbes, Commissioner,** recently decided by the Circuit Court of Ingham county, Michigan, which involves the identical question presented here, the validity of the congressional act is apparently assumed since only its construction to authorize state taxation of the character involved here is discussed in the opinion. A further definite intimation of the validity of such a federal law as applied to state taxes is found in the dissenting opinion of Justice Brandeis in **Ozark Pipe Line v. Monier,** 266 U. S., 555. At page 567 he said:

> "* * * Under the rule applied, every tax laid by any state upon the corporate franchise (properly so-called) of every corporation, domestic or foreign, must be void, **in the absence of congressional authorization,** where the corporation is actually engaged exclusively in what is deemed interstate commerce. I find in the Constitution no warrant for the assumption which leads to such a result." (Emphasis ours.)

His statement would indicate his impression that unquestionably the power of Congress to authorize state taxation such as that authorized by Public Law No. 15 would be sustained as a proper exercise of the power of Congress to regulate interstate commerce.

C. If Any Serious Question Could Be Raised as to the Validity of the Established Laws of the States Taxing Foreign Insurance Companies Doing Business Within Their Borders, a Proposition Which We Emphatically Deny, Such Question Is Put at Rest by the McCarran-Ferguson Act.

It is to be noted that there has been no decision by the Supreme Court that Congress cannot give its consent to discriminatory action; while there have been judicial expressions to the effect that Congress can effectuate otherwise unconstitutional state tax laws by consenting to the continued operation of such state laws.

The language of this court in **White & Prince v. Hennifford**, 305 U. S., 434, wherein it is said:

> "But it is not enough for present purposes that under the Commerce Clause, in the absence of congressional action, state taxation whatever its form, is precluded if it discriminates against interstate commerce * * *".

indicates a recognition of the power of Congress to validate state laws which otherwise discriminate against interstate commerce. See also **Welton v. Missouri**, 91 U. S., 275, wherein the court said with respect to the Commerce Clause:

> "* * * The power to regulate, conferred by that clause upon Congress, is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed — that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled, **how far it shall be burdened** by duties and imposts, and how far it shall be prohibited." (Emphasis ours.)

In **Finch & Co. v. McKittrick**, 305 U. S., 395, the Twenty-First Amendment which embodied the Webb-Kenyon Act, was held to permit discriminatory and retaliatory action by one state against the products of another state.

To the same effect is **International Shoe Co. v. State of Washington, et al.**, decided by this court December 3, 1945, wherein the following language is used:

> "Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1931, 26 U. S. C., Section 1606(a) provides that 'No persons required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the state law does not distinguish between employees engaged in interstate or foreign commerce, and those engaged in intrastate commerce.' **It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. Kentucky Whip & Collar Co. v. Illinois Central R. Co.**, 299 U. S., 334; **Perkins v. Pennsylvania**, 314 U. S., 586; **Standard Dredging Co. v. Murphy**, 319 U. S., 306, 308; **Hooven & Allison Co. v. Evatt**, 324 U. S., 652, 679; **Southern Pacific Co. v. Arizona**, No. 56, 1944 Term, decided June 18, 1945, slip opinion, p. 6." (Our emphasis.)

The foregoing authorities unquestionably establish the competency of Congress to pass the McCarran-Ferguson Act, which is declarative of the 75 year old policy of state taxation of foreign insurance companies, as consistently upheld by this court.

CONCLUSION.

We do not gainsay the fact that the laws of many of the states which lay a premium tax on foreign insurance companies appear on their face to discriminate between foreign and domestic companies. We do, however, emphatically deny that such discrimination constitutes an unconstitutional discrimination, or places on interstate commerce an unconstitutional burden. The mere fact that a state premium tax falls with disproportionate weight upon the business done within a state by an out of state insurance company does not place such company at a competitive disadvantage. The fact is that the burden, whatever it is, was not imposed by the state with any design against interstate commerce as such because, at the time of the enactment of our state premium tax laws, the business of insurance was not regarded as falling within the category of commerce. Since the premium tax, imposed as an annual license for the privilege of doing business within the state, was by its very origin and nature not intended as a hostile thrust at interstate commerce, it clearly devolved upon the appellant as a consequence of its own theory to show that the tax constitutes a substantial burden. This the appellant has failed to do and its failure need surprise no one. If the tax is to be called a burden, it nevertheless was one voluntarily and gladly assumed by the appellant year after year, as a result of its own initiative and enterprise, and a burden which, in view of the record as to its volume of business within the state, rests upon it very lightly. The

assertion that a tax voluntarily accepted and paid year after year as the price of carrying on business of its own eager seeking places the appellant at a competitive disadvantage with respect to that business is, to say the least, bewildering as an argument. As a proposition needing to be established by evidence to win judicial acceptance, it would seem quite hopeless.

The unreality of the entire argument with respect to the burden of this or any other so-called discriminatory state tax on foreign insurance companies is well exemplified by the statement of the Indiana Supreme Court in **State of Indiana v. Prudential Insurance Co.**, supra. Commenting upon the business of **this same appellant** in Indiana, the court said:

> "Appellee was first authorized and licensed to do business in Indiana in 1903 and at that time there was, and continuously since 1891 there has been, in effect in Indiana a premium tax law substantially the same as above quoted.
>
> Since 1903 appellee has developed a very large insurance business in Indiana. On December 31, 1944, it maintained 54 district offices in Indiana wherein 256 persons were employed and it had 636 agents engaged in selling insurance in Indiana and 347 physicians who examined applicants for policies. At that time, it had in force 1,332,785 policies insuring the lives of approximately 866,000 persons resident in Indiana for a total amount of over $726,000,000. During the year ending December 31, 1944, it sold and issued and delivered policies insuring the lives of approximately 74,000 persons resident in Indiana for a total amount of $81,915,223, and during that year it paid over $7,000,000 in claims on policies upon the lives of Indiana residents. It had over $619,000 deposited in Indiana banks.
>
> . . . . . .

Appellee contends that in the light of the Supreme Court opinion in **United States v. South-Eastern Underwriters Assn.** (1944), 322 U. S., 533, 88 L. Ed., 1440, 64 S. Ct., 1162, the premium tax authorized by the Indiana statute violates the Commerce Clause of the federal Constitution and the equal protection clause of the Fourteenth Amendment. In our consideration of these contentions we have had in mind, in addition to the facts already mentioned, that when appellee first entered Indiana to do business the same three (3) per cent premium tax was imposed by our statutes that is imposed today, and that it came and has stayed voluntarily and has prospered and has built up a business in Indiana that in 1944 was more than double the Indiana business of all life insurance companies organized in Indiana put together. It has paid this tax continuously every year without protest or objection. It has adjusted its Indiana business to the requirements of the statute without finding the burden too heavy or practically discriminating, and Indiana has adjusted its fiscal policy and governmental financing to the income so derived and has evolved through the years a tax structure of which this premium tax, with 108 foreign life insurance companies doing business in Indiana, has become an indispensable part." (Emphasis ours.)

The tax complained of in the instant case is imposed under the constitutional power of the state of South Carolina to tax foreign corporations for the privilege of entering the state to do business within its borders. It is not laid on commerce between the states and, consequently, does not unconstitutionally burden or restrict interstate commerce, and the long, unbroken line of decisions of this court, which have so held, stand undis-

turbed and unimpaired by **United States v. South-Eastern Underwriters Association.**

Respectfully submitted,

WILLIAM M. McQUEEN,
Attorney General of Alabama,
JAMES A. EMMERT,
Attorney General of Indiana,
A. B. MITCHELL,
Attorney General of Kansas,
CLARENCE A. BARNES,
Attorney General of Massachusetts,
JOHN R. DETHMERS,
Attorney General of Michigan,
WALTER R. JOHNSON,
Attorney General of Nebraska,
NATHANIEL L. GOLDSTEIN,
Attorney General of New York,
HUGH S. JENKINS,
Attorney General of Ohio,
MAC Q. WILLIAMSON,
Attorney General of Oklahoma,
GROVER SELLERS,
Attorney General of Texas.

SUPREME COURT OF THE UNITED STATES.

No. 707.—October Term, 1945.

The Prudential Insurance Company, Appellant, *vs.* L. George Benjamin, as Insurance Commissioner of the State of South Carolina.	Appeal from the Supreme Court of the State of South Carolina.

[June 3, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case and *Robertson* v. *California*, No. 274, decided today, bring not unexpected sequels to *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533. In cycle reminiscent conversely of views advanced there and in *Paul* v. *Virginia*, 8 Wall. 168, claims are put forward on the basis of the *South-Eastern* decision to sustain immunity from state taxation and, in the *Robertson* case, from state regulation of the business of insurance.

The specific effect asserted in this case is that South Carolina no longer can collect taxes from Prudential, a New Jersey corporation, which for years prior to 1945 the state had levied and the company had paid. The tax is laid on foreign insurance companies and must be paid annually as a condition of receiving a certificate of authority to carry on the business of insurance within the state. The exaction amounts to three per cent of the aggregate of premiums received from business done in South Carolina, without reference to its interstate or local character.[1] No similar tax is required of South Carolina corporations.[2]

[1] The statutes imposing the tax are §§ 7948 and 7949, South Carolina Code of 1942. Each section in fact imposes a separate tax, the former of two per cent, the latter of one per cent, on gross premium returns "from the State," with provisions under § 7948 for reduction in the amount of the tax scaled to specified investments in South Carolina securities or property. Both taxes are laid "in addition to the annual license fees now provided by law," and are stated in terms to be required "as an additional and graded license fee" (§ 7948) or as "a graduated license fee." § 7949. The two taxes have been treated in combination, for purposes of this litigation, as being in effect a single tax of three per cent.

[2] Sections 7948 and 7949 expressly exempt South Carolina corporations from payment of the tax. They however are subject to other taxes, which Prudential maintains have no bearing upon the issues, other than possibly

Prudential insists that the tax discriminates against interstate commerce and in favor of local business, since it is laid only on foreign corporations and is measured by their gross receipts from premiums derived from business done in the state, regardless of its interstate or local character. Accordingly it says the tax cannot stand consistently with many decisions of this Court outlawing state taxes which discriminate against interstate commerce.[2] South Carolina denies that the tax is discriminatory[4] or has been affected by the *South-Eastern* decision. But in any event it maintains that the tax is valid, more particularly in view of the McCarran Act,[5] by which it is claimed Congress has consented to continuance of this form of taxation and thus has removed any possible constitutional objection which otherwise might exist. This Prudential asserts Congress has not done and could not do.

The State Supreme Court has held the continued exaction of the tax not to be in violation of the commerce clause or affected by the ruling made in the *South-Eastern* case.— S. C. —; 35 S. E. 2d 586. That holding presents the principal basis for this appeal.

I.

The versatility with which argument inverts state and national power, each in alternation to ward off the other's incidence,[6] is not simply a product of protective self-interest. It is a recurring

---

to demonstrate the discriminatory character and effects of the exaction in issue. See note 36. These are chiefly taxes on real and personal property, incidence of which Prudential largely escapes by the location of its property in other states.

[3] Extending from Welton v. Missouri, 91 U. S. 275, to Nippert v. Richmond, 326 U. S. —. See the collection of authorities in McGoldrick v. Berwind-White Co., 309 U. S. 33, 56, n. 11.

[4] In apparent reliance not only upon decisions rendered prior to the South-Eastern decision or made without reference to its ruling, e. g., Lincoln National Ins. Co. v. Read, 325 U. S. 673; Bethlehem Motors Corp. v. Flynt, 256 U. S. 421; but indeed also Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648; and like authorities.

The state also maintains that Prudential's South Carolina business is not altogether interstate commerce but consists, in substantial part, of local transactions, the aggregate of which measures the tax, for which view it relies upon such diverse decisions as McGoldrick v. Berwind-White Co., 309 U. S. 33; International Shoe Co. v. Shartel, 279 U. S. 429; Western Live Stock v. Bureau of Revenue, 303 U. S. 250; and Polish National Alliance v. National Labor Relations Board, 322 U. S. 643. See note 36 and text.

[5] The pertinent portions of the Act are set forth in the text, Part III, at note 37.

[6] Cf. United States v. South-Eastern Underwriters, 322 U. S. 533, at notes 9 and 23; but see also note 33 for an early and highly authoritative but less mutually exclusive view of the possible alternatives.

manifestation of the continuing necessity in our federal system for accommodating the two great basic powers it comprehends. For this Court's part, from *Gibbons* v. *Ogden*, 9 Wheat. 1, no phase of that process has been more continuous or at times perplexing than reconciling the paramount national authority over commerce, created by Article I, § 8 of the Constitution, with appropriate exercise of the states' reserved powers touching the same or related subject matter.[7]

The continuing adjustment has filled many of the great constitutional gaps of Marshall's time and later.[8] But not all of the filling has been lasting. Great emphases of national policy swinging between nation and states in historic conflicts have been reflected, variously and from time to time, in premise and therefore in conclusion of particular dispositions.[9] In turn, their sum has shifted and reshifted the general balance of authority, inevitably producing some anomaly of logic and of result in the decisions.

No phase has had a more atypical history than regulation of the business of insurance. This fact is important for the problems now presented. They have origin in that history. Their solution cannot escape its influence. Moreover, in law as in other phases of living, reconciliation of anomalous behavior, long continued, with more normal attitudes is not always easy, when the time for that adjustment comes.

Essentially, the problems these cases tender are of that character. It is not necessary to renew the controversy presented in *South-Eastern*. Whether or not that decision properly has been characterized as "precedent-smashing,"[10] there was a reorientation of attitudes toward federal power in its relation to

[7] Among the volumes which have been written, special reference may be made to Frankfurter, The Commerce Clause (1937); Ribble, State and National Power over Commerce (1937); Gavit, The Commerce Clause (1932); and see Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1. For thoughtful comment since the South Eastern decision, see Patterson, The Future of State Supervision of Insurance (1944) 23 Tex. L. Rev. 18; Note, Congressional Consent to Discriminatory State Legislation (1945) 45 Col. L. Rev. 927.

[8] "Judges legislate interstitially and the interstices were great in Marshall's time." Ribble, State and National Power over Commerce (1937) 47.

[9] "Lines of demarcation are drawn largely according to the pull of the Court at one period towards the interests of local self-government, and at another in the direction of a nation-wide rule." Frankfurter, The Commerce Clause (1937) 97.

[10] S. Rep. No. 1112, 78th Cong., 2d Sess. 2.

the business of insurance conducted across state lines. Nece[illegible] this worked in two directions. As the opinion was at [illegible] note, 322 U. S. 533, 545 ff., no decision previously had [illegible] invalid an Act of Congress on the ground that such business [illegible] beyond reach of its power, because previously no attempted exercise of that authority had been brought here in litigation. [illegible] from *Paul* v. *Virginia* to *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, negative implication from the commerce clause was held not to place any limitation upon state power over the business, however conducted with reference to state lines. And correlatively this was taken widely, although not universally, to nullify federal authority until the question was squarely presented and answered otherwise in the *South-Eastern* case.

Whether *Paul* v. *Virginia* represented in its day an accommodation with or a departure from the preexisting evolution of commerce clause law and whether its ruling, together with later ones adhering to it, remained consonant with the subsequent general development of that law, may still be debated. But all may concede that the *Paul* case created for the business of insurance a special, if not a wholly unique, way of thinking and acting in the regulation of business done across state lines. See Ribble, State and National Power over Commerce (1937) 89, 186-187. The aegis of federal commerce power continued to spread over and enfold other business so conducted, in both general and specific legislative exertions. Usually this was with judicial approval; and, despite notable instances of initial hostility, the history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory.[11] The plain words of the grant have made courts cautious, except possibly in some of the instances noted, about nullifying positive exertions of Congress' power over this broad and hard to define field. At the same time, physical and economic changes in

[11] E. g., Hammer v. Dagenhart, 247 U. S. 251, overruled by United States v. Darby, 312 U. S. 100; compare United States v. E. C. Knight Co., 156 U. S. 1, with United States v. American Tobacco Co., 221 U. S. [illegible]; Schechter Corp. v. United States, 295 U. S. 495, with National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1. See also discussion in Wickard v. Filburn, 317 U. S. 111, 118 ff.

See Ribble, State and National Power over Commerce (1937) 63, n. 38, for listing of the decisions invalidating Acts of Congress prior to 1879, noting that Mr. Justice Miller was "but slightly in error" in the statement, in Trade Mark Cases, 100 U. S. 82, 96, that one then might count "on the fingers" those decisions.

the way commerce is carried on has called forth a constantly increasing volume of legislation exercising that power.[12]

Concurrently with this general expansion, however, from *Paul* to *South-Eastern* the states took over exclusively the function of regulating the insurance business in its specific legislative manifestations. Congress legislated only in terms applicable to commerce generally, without particularized reference to insurance. At the same time, on the rationalization that insurance was not commerce, yet was business affected with a vast public interest,[13] the states developed comprehensive regulatory and taxing systems. And litigation of their validity came to be freed of commerce clause objections, at any rate from *Deer Lodge* on to *South-Eastern*. Due process in its jurisdictional aspects remained to confine the reach of state power in relation to business affecting other states.[14] But the negative implications of the commerce clause became irrelevant, as such, for the valid exercise of state regulatory and taxing authority.

Meanwhile the business of insurance experienced a nation-wide expansion graphically depicted not only in the facts of the situation presented in the *South-Eastern* case but also in the operations of Prudential as described by its advocates in this cause.[15] These divergent facts, legal and economic, necessarily were re-

---

[12] Beginning in modern phase with enactment of Interstate Commerce Commission and Anti-Trust legislation near the beginning of the present century. The catalogue is now too long to repeat here.

[13] See German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 414, 415; La Tourette v. McMaster, 248 U. S. 465, 467; National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71, 74; cf. Osborn v. Ozlin, 310 U. S. 53, 65: "Government has always had a special relation to insurance." See also United States v. South-Eastern Underwriters Ass'n, 322 U. S. 533, dissenting opinion at 585.

[14] See Allgeyer v. Louisiana, 165 U. S. 578; New York Life Ins. Co. v. Head, 234 U. S. 149; Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; St. Louis Compress Co. v. Arkansas, 260 U. S. 346; Hoopeston Co. v. Allen, 318 U. S. 313; Powell, The Supreme Court and State Police Power, 1922-1930 (1932) 140 *et seq.*; also St. Louis Southwestern Ry. Co. v. Alexander, 227 U. S. 218, with which compare Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) c. V. Cf. Harvester Co. v. Dept. of Treasury, 322 U. S. 340, concurring opinion, 349, at 353 ff.; and see International Shoe Co. v. Washington, 326 U. S. —.

[15] According to Prudential's brief, it transacts business in all forty-eight states and on December 31, 1944, "had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of $22,741,434,075; and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000 on such lives. During the year 1944 the Appellant issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons.

flected in state legislation. States grappling with nation-wide, but nationally unregulated, business inevitably exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the commerce clause's implied prohibition. Obvious and widespread examples are furnished in broad and detailed licensing provisions, for the doing of business within the states, and in connected or distinct taxing measures drawn in apparent reliance upon freedom from commerce clause limitations.[16]

Now we are told many of these statutes no longer can stand. The process of readjustment began affirmatively with *South-Eastern*. Since the commerce clause is a two-edged instrument, the indicated next step, indeed the constitutionally required one, as the argument runs, is to apply its negatively cutting edge. Conceptions so developed with reference to other commerce must now be extended to the commerce of insurance in completion of the readjustment. This, it is confidently asserted, will require striking down much of the state legislation enacted and effective prior to the *South-Eastern* decision. Particularly will this be true of all discriminatory state taxes, of which it is said South Carolina's is one. Moreover, those results must follow regardless of the McCarran Act's provisions. For by that Act, in Prudential's assessment, Congress neither intended to, nor could, validate such taxes.

It is not surprising that the attack is thus broad. When a decision is conceived as precedent-smashing, rightly or wrongly, the conception's invitation may be to greater backtracking than is

---

in the total amount of $2,668,714,022; and entered into 451 annuity contracts operative during the lives of approximately 600 persons and providing for an annual income of approximately $150,000 on such lives. During the year 1944 the Appellant collected as premiums on insurance policies $681,052,095.07, and paid out as claims on policies $246,776,197.45; and it paid out $13,699,781.93 on annuity contracts."

For South Carolina, the company "had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in said State for a total amount of $30,827,184.00. During the year ending December 31, 1944, 1,400 policies insuring the lives of approximately 1,000 persons resident in said State for a total amount of $1,475,062.00 were issued, and $457,602.28 in claims were paid on policies covering the lives of residents." The South Carolina premium tax for 1943 amounted to $18,496.87; for 1944, $19,670.94. All other state or local taxes paid in 1944 amounted to $3,103.92, making a total for the year for all taxes of $22,780.86.

[16] 322 U. S. 533, dissenting opinion at 590; see note 40, *infra*; cf. Robertson *v.* California, No. 274, decided today.

justified, in spite of warning to proceed with care. 322 U. S. 533, 547 ff.

Prudential's misconception relates not to the necessity for applying, but to the nature and scope of the negative function of the commerce clause. It is not the simple, elgan-cutting tool supposed. Nor is its swath always correlative with that cut by the affirmative edge, as seems to be assumed. For cleanly as the commerce clause has worked affirmatively on the whole, its implied negative operation on state power has been uneven, at times highly variable. More often than not, in matters more governable by logic and less by experience, the business of negative implication is slippery. Into what is thus left open for inference to fill, divergent ideas of meaning may be read much more readily than into what has been made explicit by affirmation. That possibility is broadened immeasurably when not logic alone, but large choices of policy, affected in this instance by evolving experience of federalism, control in giving content to the implied negation. In all our constitutional history this has become no more apparent than in commerce clause dispositions.

That the clause imposes some restraint upon state power has never been doubted. For otherwise the grant of power to Congress would be wholly ineffective. But the limitation not only is implied. It is open to different implications of meaning. And this accounts largely for variations i. this field, continuing almost from the beginning until now.[17] They started with Marshall, and

[17] That the question was discussed but not settled in the Constitutional Convention itself, appears from debate on September 15, 1787, two days before submission of the proposed Constitution to Congress, a portion of which bears quotation:

"Mr. McHenry & Mr. Carrol, moved that 'no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses.'

"Col. Mason in support of this explained and urged the situation of the Chesapeak which peculiarly required expences of this sort.

"Mr. Govr. Morris. The States are not restrained from laying tonnage as the Constitution now Stands. The exception proposed will imply the Contrary, and will put the States in a worse condition than the gentleman (Col. Mason) wishes.

"Mr. Madison. Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States.—They may certainly be restrained by Treaty. He observed that there were other objects for tonnage duties as the support of Seamen &c. He was more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority.

"Mr. Sherman. The power of the U. States to regulate trade being supreme can controul interferences of the State regulation [when] such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.

Taney, went forward from Waite to Fuller, and have been projected in later differences perhaps less broad, but hardly less controversial.[18] Consequently in its prohibitive, as in its affirmative or enabling, effects the history of the commerce clause has been one of very considerable judicial oscillation.

Moreover, the parallel encompasses the latest turn in the long-run trend. For, concurrently with the broadening of the scope for permissible application of federal authority,[19] the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce,[20] and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic.[21] These facts are of great importance for disposing of such controversies. For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action.

"Mr. Langdon insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it. On motion 'that no State shall lay any duty on tonnage without the Consent of Congress.'

"N. H.—ay Mas. ay. Ct. divd. N. J. ay. Pa. no. Del. ay. M[illegible] Va. no. N-C no S-C ay Geo. no. [Ayes—6; nos.—4; divided—1.]" Farrand, Records of the Federal Constitutional Convention of 1787 (1937), Vol. II, 625,626.

See Note, Congressional Consent to Discriminatory State Legislation (1942) 55 Col. L. Rev. 927, 946 ff., for a short summary of views expressed in the debates and later by members of the Convention. See also Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment (1941) 25 Minn. L. Rev. 432; Hamilton and Adair, The Power to Govern (1937).

[18] "The categories of 'burdens' on interstate commerce, of state laws directly affecting' commerce, etc., are natural concomitants of Marshall's doctrine. The theories as to the silence of Congress are the outgrowth of Taney's. When diverse theories cohabit, the miscegenation may produce strange progeny." Ribble, 204. For tracings of all but the latest of the various trends see the summaries cited in note 7; see also Biklé, The Silence of Congress (1927) 41 Harv. L. Rev. 200. More recent diversities are discussed in Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1, 8 ff. See also e. g., the different views expressed in Nippert v. Richmond, 326 U. S. —, Southern Pacific Co. v. Arizona, 325 U. S. 761; McLeod v. Dilworth Co., 322 U. S. 327; Northwest Airlines v. Minnesota, 322 U. S. 292; and the opinions in Hooven & Allison Co. v. Evatt, 324 U. S. 652. And compare American Mfg. Co. v. St. Louis, 250 U. S. 459, with Adams Mfg. Co. v. Storen, 304 U. S. 307.

[19] See note 11 and text.

[20] Cf., e. g., South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177; Western Live Stock v. Bureau of Revenue, 303 U. S. 250; McGoldrick v. Berwind-White Co., 309 U. S. 33; Nelson v. Sears, Roebuck & Co., 312 U. S. 359; California v. Thompson, 313 U. S. 109; Duckworth v. Arkansas, 314 U. S. 390; Union Brokerage Co. v. Jensen, 322 U. S. 202, 209 ff.

[21] Cf. Nippert v. Richmond, 326 U. S. —, —, notes 9 and 23, and authorities cited.

II.

We are not required however to consider whether, on that level, the authorities on which Prudential chiefly relies would require invalidation of South Carolina's tax. For they are not in point. As has been stated, they are the cases which from *Welton* v. *Missouri*, 91 U. S. 275, until now have outlawed state taxes found to discriminate against interstate commerce.[22] No one of them involved a situation like that now here. In each the question of validity of the state taxing statute arose when Congress' power lay dormant. In none had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. Those cases therefore presented no question of the validity of such a tax where Congress had taken affirmative action consenting to it or purporting to give it validity. Nor, consequently, could they stand as controlling precedents for such a case.

This would seem so obvious as hardly to require further comment, except for the fact that Prudential has argued so earnestly to the contrary. Its position puts the McCarran Act to one side, either as not intended to have effect toward validating this sort of tax or, if construed otherwise, as constitutionally ineffective to do so. Those questions present the controlling issues in this case. But before we turn to them it will be helpful to note the exact effects of Prudential's argument.

Fundamentally it maintains that the commerce clause "of its own force" and without reference to any action by Congress, whether through its silence[23] or otherwise, forbids discriminatory state taxation of interstate commerce. This is to say, in effect, that neither Congress acting affirmatively nor Congress and the

---

[22] See note 3, and compare: "... State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress." Lewis, White & Prince v. Henderson, 305 U. S. 434, dissenting opinion at 446.

"... except for State acts designed to impose discriminatory burdens on interstate commerce because of its interstate character, Congress alone must determine how far [interstate commerce] ... shall be free and untrammeled, how far it shall be burdened by duties and imposts and how far it shall be prohibited." Id. at 455.

See also, for essentially the same position, Adams Mfg. Co. v. Storen, 304 U. S. 307, dissenting opinion; Southern Pac. Co. v. Arizona, 325 U. S. 761, dissenting opinion at 795.

[23] See note 18.

states thus acting coordinately can validly impose any regulation which the Court has found or would find to be forbidden by the commerce clause, if laid only by state action taken while Congress' power lies dormant. In this view the limits of state power to regulate commerce in the absence of affirmative action by Congress are also the limits of Congress' permissible action in this respect, whether taken alone or in coordination with state legislation.

Merely to state the position in this way compels its rejection. So conceived, Congress' power over commerce would be nullified to a very large extent.[24] For in all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of its power. Much less has this boundary been thought to confine what Congress and the states acting together may accomplish. So to regard the matter would invert the constitutional grant into a limitation upon the very power it confers.

The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce. On the contrary, it is, as Marshall declared in *Gibbons* v. *Ogden*, a grant to Congress of plenary and supreme authority over those subjects. The only limitation it places upon Congress' power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make Congressional regulation necessary or appropriate.[25] This limitation, of course, is entirely distinct from the implied prohibition of the commerce clause. The one is concerned with defining commerce, with fixing the outer boundary of the field over which the authority granted shall govern. The other relates only to matters within the field of commerce, once this is defined, including whatever may fall within the "affectation" doctrine. The one limitation bounds the power of Congress. The other confines only the powers of the states. And

[24] Thus, for instance, the limitations upon the length of trains imposed by the Arizona Train Limit Law, and held to be in violation of the commerce clause in Southern Pacific Co. *v.* Arizona, 325 U. S. 761, would be beyond the power of Congress, perhaps also of Congress and the states acting together, to impose; and on commerce clause grounds, thus nullifying the very power conferred in order to regulate such matters. The argument is reminiscent of that of Mr. Justice McLean in the second Wheeling Bridge case, cf. note 34.

[25] Cf. note 11 and text.

the two areas are not coextensive. The distinction is not always clearly observed, for both questions may and indeed at times do arise in the same case and in close relationship.[26] But to blur them, and thereby equate the implied prohibition with the affirmative endowment is altogether fallacious. There is no such equivalence.

This appears most obviously perhaps in the cases most important for the decision in this cause. They are the ones involving situations where the silence of Congress or the dormancy of its power has been taken judicially, on one view or another of its constitutional effects,[27] as forbidding state action, only to have Congress later disclaim the prohibition or undertake to nullify it.[28] Not yet has this Court held such a disclaimer invalid or that state action supported by it could not stand. On the contrary in each instance it has given effect to the Congressional judgment contradicting its own previous one.[29]

It is true that rationalizations have differed concerning those decisions,[30] indeed also that the judges participating in them differed in this respect.[31] But the results have been lasting and are at least as important, for the direction given to the process of accommodating federal and state authority, as the reasons stated for reaching them. None of the decisions conceded, because none involved any question of, the power of Congress to make conclusive its own mandate concerning what is commerce. But apart from that function of defining the outer boundary of its power, whenever Congress' judgment has been uttered affirma-

[26] See the argument for the plaintiff in error in Paul v. Virginia, 8 Wall. 168, 172, 173, as a classic instance.

[27] Cf. note 18. See also the discussions cited in note 7.

[28] Legislation which, typically, has presented the problem is found in a variety of measures, of which the Wilson Act, 26 Stat. 313, is the prototype. Earlier legislation presenting the difficulty was that involved in the second of the Wheeling Bridge cases, Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. 421. See note 43 for further citations.

[29] Pennsylvania v. Wheeling and Belmont Bridge Co., 13 How. 518, with which compare Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. 421, and The Clinton Bridge, 10 Wall. 454; Leisy & Co. v. Hardin, 135 U. S. 100, with which compare In re Rahrer, 140 U. S. 545; Bowman v. Chicago & Northwestern Ry., 125 U. S. 465, with which compare Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311.

[30] See, e. g., Ribble, at 62, 106, and other materials cited above in note 7.

[31] For the modern record it is interesting to note that in the first Bridge case Justice McLean spoke for the Court, Chief Justice Taney and Justice Daniel dissenting in separate opinions, and the same division prevailed in the further opinions filed upon consideration of the master's report and entry of the decree. In the second Bridge case Justice Nelson spoke for the Court, with Justices McLean, Grier, Wayne and Daniel each filing separate opinions dissenting on one or more of the issues presented.

tively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval.

Some part of this readjustment may be explained in ways acceptable on any theory of the commerce clause and the relations of Congress and the Courts toward its functioning.[32] Such explanations, however, hardly go to the root of the matter. For the fact remains that, in these instances, the sustaining of Congress' overriding action has involved something beyond correction of erroneous factual judgment in deference to Congress' presumably better-informed view of the facts,[33] and also beyond giving due deference to its conception of the scope of its powers, when it repudiates, just as when its silence is thought to support, the inference that it has forbidden state action.[34]

---

[32] Thus, in some instances conceivably the reversal might be rationalized as only one of factual judgment, made in deference to the contrary finding of like character made by a body better able to make such a determination. Moreover, 'Congress' supporting action deprives the Court's adverse view concerning state legislation of any strength which may have been derived from the inference that Congress, by its silence, had impliedly forbidden it. Hence insofar as its judgment may be taken, not as conclusive, but as being entitled to deference here on questions relating to its power (and historically the scope of that deference has been great, cf. note 11), Congress' explicit repudiation of the attitude inferentially attributed to it from its silence, compels reversal of the Court's earlier pronounced view.

[33] In the first Wheeling Bridge case the Court itself made the finding, upon evidence taken by a master, that the bridge in fact obstructed navigation, to which it added the legal conclusion that it was a public nuisance, and went on to specify the height to which it must be raised to avoid this effect. Not only this finding of fact, therefore, but also the legal conclusion drawn from it was, in effect, overturned by the Act of Congress. See note 34. The finding of obstruction in fact depended in no sense upon previous determination by Congress. But the Court found in Congress' prior legislation a policy of freedom for navigation which it applied to outlaw the bridge.

[34] See note 33. "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of law. . . . The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation." Mr. Justice Nelson, speaking for the Court, in the second Wheeling Bridge case, 18 How. 421, 430, 431.

Compare the dissenting opinion of Mr. Justice McLean, who wrote for the majority in the first Wheeling Bridge case, going not only on the ground, among others, that the Act of Congress invaded the judicial function, but also that the Act, apart from this effect, was unconstitutional: "It [Congress] may, under this power, declare that no bridge shall be built which shall be an obstruction to the use of a navigable water. And this, it would seem, is as far as the commercial power of congress can be exercised." 13 How. at 442. Thus was the grant of authority to Congress upon which he relied in the first decision, in part, to outlaw the bridge, converted into a limitation. Cf. text [illegible], Part IV, at note 9 ff.

II

24

Prudential has not squarely met this fact. Fixed with the sense of applicability of the *Welton* or *Shelby County* line of cases, it rather has posed an enigma for the bearing of the Bridge and liquor cases upon the decision to be made. It is, if the commerce clause "by its own force" forbids discriminatory state taxation, or other measures, how is it that Congress by expressly consenting can give that action validity?

The answer need not be labored. Prudential in this case makes no contention that commerce is not involved. Its argument is exactly the opposite. Its contention founded on the commerce clause is one wholly of implied prohibition within the field of commerce.

This it regards as operative not only in Congress' silence, but in the face of its positive expression by the McCarran Act that the continued regulation and taxation by the states of the business of insurance is in accord with Congress' policy. That expression raises questions concerning its own validity and also concerning whether the policy stated extends to the kind of state legislation which is immediately in issue. But those questions are not answered, as Prudential seeks to have them answered, by any conception that Congress' declaration of policy adds nothing to the validity of what the states have done within the area covered by the declaration or, in other words, that it is mere *brutum fulmen*. For to do this not only would produce intolerable consequences for restricting Congress' power. It would ignore the very basis on which the second *Wheeling Bridge* case and indeed the *Clark Distilling* case have set the pattern of the law for governing situations like that now presented.[35] Accordingly we turn to the issues which are more alive and significant for the future.

III.

In considering the issues raised by the McCarran Act and the question of its applicability, ground may be cleared by putting aside some matters strenuously argued in the state supreme court and here. First, it follows from what has been said that we are not required to determine whether South Carolina's tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act. And, for reasons

[35] Cf. note 29 and text. And see Part IV.

to be stated, we think that the declaration's effect is clearly to sustain the exaction and that this can be done without violating any constitutional provision.

By the same token, we need not consider whether the tax, if operative in Congress' unilluminated silence, would be discriminatory in the sense of an exaction forbidden by the commerce clause, as Prudential categorically asserts, or not so, as South Carolina maintains with equal certitude. Much attention has been given both here and in the state court to these questions. But in the view we take of the case the controlling issues underrun them. Nor do we determine, as Prudential's argument seems to subsume, whether all of its business done in South Carolina and affected by the tax should be regarded as constituting interstate commerce so as to fall within the "in commerce" classification or, on the other hand, some of it may properly be considered as being only local or intrastate business.[36] These questions we put to one side. And for present purposes we assume that the tax would be discriminatory in the sense of Prudential's contention and that all of its business done in South Carolina and affected by the tax is done "in" or as a part of interstate commerce.

It is not necessary to spend much time with interpreting the McCarran Act. Pertinently it is as follows:

> Sec. 1. The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any

[36] Whether within or without the "affectation" doctrine. Cf. United States v. South-Eastern Underwriters Ass'n, 322 U. S. 533, 548, and authorities cited.

In making these assumptions, however, it is not improper to note that the record, as made in the state court, does not purport to deal factually with the latter question as a matter of proof. It is simply alleged that all of Prudential's South Carolina business is done interstate, an allegation which is denied; and there are supporting allegations concerning the extent of the business and manner of conducting it.

Nor is the case in much better shape factually on the question of discrimination. While the briefs include tables of figures designed to show that Prudential pays more proportionately under the tax than South Carolina corporations pay under other taxes levied against them, cf. note 2, these figures were not made part of the record in the state court until the petition for rehearing was filed, and Prudential has insisted both there and here that they have no proper place in consideration of the questions presented. Its position is that the tax is discriminatory on the face of the statute and without reference to other taxes South Carolina corporations may pay. Cf. note 4.

We express no opinion concerning whether such a showing, in either respect, would be sufficient to require determination of the issues to which it is directed, tendered in the absence of action by Congress.

barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . ." 59 Stat. 34; 15 U. S. C. §§ 1011-1015.[37]

Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation.[38] The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

It would serve no useful purpose now to inquire whether or how far this effort was necessary, in view of the explicit reservations made in the majority opinion in the *South-Eastern* case.

[37] The remainder of the statute, including a proviso to § 2(b), relates to applicability of the Sherman Act and other related federal statutes to the business of insurance before and after January 1, 1948; provides that the McCarran Act shall not affect in any manner the application to that business of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act of 1920; extends the term "State" as used in the Act to include specified territories and the District of Columbia; and provides for severability.

[38] See note 37.

Nor is it necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of legislation must have been some provisions which may have been subject to serious question on the score of other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress' power. And we agree with Prudential that there can be no inference that Congress intended to circumvent constitutional limitations upon its own power.

But, though Congress had no purpose to validate unconstitutional provisions of state laws, except in so far as the Constitution itself gives Congress the power to do this by removing obstacles to state action arising from its own action or by consenting to such laws, H. Rep. No. 143, 79th Cong., 1st Sess., p. 3, it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.

Two conclusions, corollary in character and important for this case, must be drawn from Congress' action and the circumstances in which it was taken. One is that Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation,[39] are not required in reference to the business of insurance, by the national public interest, except in the specific respects otherwise expressly provided for. This necessarily was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in the competition with local business. Such taxes

[39] There is, of course, no constitutional requirement that state taxes must be uniform, in the sense of that requirement as laid upon the federal taxing power by the first clause of Article I, § 8. Nor has it ever been held that such a requirement is made by the commerce clause or any other constitutional provision. This is a different thing entirely from the strictures against discrimination within or by a state laid under the equal protection and commerce clauses.

The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce, is not of such a character as to require uniformity of treatment within the distinction taken in the doctrine of Cooley v. Board of Wardens, 12 How. 299, except as otherwise expressly declared.

were not uncommon among the states,[40] and the statute clearly included South Carolina's tax now in issue.

That judgment was one of policy and reflected long and clear experience. For, notwithstanding the long incidence of the tax and its payment by Prudential without question prior to the *South Eastern* decision, the record of Prudential's continuous success in South Carolina over decades[41] refutes any idea that payment of the tax handicapped it in any way tending to exclude it from competition with local business or with domestic insurance companies. Indeed Prudential makes no contrary contention on any factual basis, nor could it well do so. For the *South-Eastern* decision did not, and could not, wipe out all this experience or its weight for bearing, as a matter of the practical consequences resulting from operation of the tax, upon that question. *Robertson v. United States*, No. 274, decided today.

Consequently Prudential's case for discrimination must rest upon the idea either that the commerce clause forbids the state to exact more from it in taxes than from purely local business; or that the tax is somehow technically of an inherently discriminatory character or possibly of a type which would exclude or seriously handicap new entrants seeking to establish themselves in South Carolina. As to each of these grounds, moreover, the argument subsumes that Congress' contrary judgment, as a matter of policy relating to the regulation of interstate commerce, cannot be effective, either "of its own force" alone or as operative in conjunction with and to sustain the state's policy.

---

[40] As of the effective date of the McCarran Act, sixteen states had imposed on "foreign" life insurance companies taxes substantially similar to the South Carolina tax in issue. Ala. Code (1940) tit. 51, §§ 816, 819; Fla. Stat. (1941) § 205.43(1), (6); Ill. Rev. Stat. (1943) c. 73, § 1021; Ind. Stat. Ann. (Burns, 1940) § 39-4802; Kan. Gen. Stat. Ann. (Corrick, 1935) § 40-252; Ky. Rev. Stat. (1944) 136.330; La. Gen. Stat. (Dart, 1939) § 8369; Mich. Comp. Laws (1929) § 12387; Mo. Rev. Stat. (1939) § 6094; Neb. Rev. Stat. (1943) § 77-902; N. M. Stat. Ann. (1941) § 60-401; N. D. Comp. Laws (1913) § 4924; Ohio Code Ann. (Throckmorton, 1940) § 5433; Pa. Stat. Ann. (Purdon, 1930) tit. 72, § 2261; S. C. Code Laws (1942) §§ 7948, 7949; Tex. Civ. Stat. (Vernon, 1925) Art. 4769.

We express no opinion concerning the validity of any feature of these statutes not substantially identical with those of the South Carolina tax dealt with herein.

[41] Prudential was first authorized to do business in South Carolina in 1897 and since that time it has received annual renewals of its license. As to the present scope of its business in South Carolina and in all the states, see note 15.

IV.

In view of all these considerations, we would be going very far to rule that South Carolina no longer may collect her tax. To do so would flout the expressly declared policies of both Congress and the state. Moreover it would establish a ruling never heretofore made and in doing this would depart from the whole trend of decision in a great variety of situations most analogous to the one now presented. For, as we have already emphasized, the authorities most closely in point upon the problem are not, as appellant insists, those relating to discriminatory state taxes laid in the dormancy of Congress' power. They are rather the decisions which, in every instance thus far not later overturned,[42] have sustained coordinated action taken by Congress and the states in the regulation of commerce.[43]

The power of Congress over commerce exercised entirely without reference to coordinated action ~~taken by~~ of the states is not restricted, except as the Constitution expressly provides,[44] by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate com-

---

[42] Cf. Ashton *v.* Cameron County District, 298 U. S. 513, which may be said in effect to have been overruled by United States *v.* Bekins, 304 U. S. 27. See Jackson, The Struggle for Judicial Supremacy (1941) 240-241.

[43] See Carmichael *v.* Southern Coal Co., 301 U. S. 495; Steward Machine Co. *v.* Davis, 301 U. S. 548; Kentucky Whip & Collar Co. *v.* Illinois Central R. Co., 299 U. S. 334; Clark Distilling Co. *v.* Western Maryland Ry. Co., 242 U. S. 311; Whitfield *v.* Ohio, 297 U. S. 431; In re Rahrer, 140 U. S. 545; Perkins *v.* Pennsylvania, 314 U. S. 586; Standard Dredging Co. *v.* Murphy, 319 U. S. 306, 308; International Shoe Co. *v.* Washington, 66 Sup. Ct. 154, 157-158; *cf.* Parker *v.* Richard, 250 U. S. 235, 238-239. See generally Konig, Federal and State Cooperation under the Constitution (1938) 36 Mich. L. Rev. 752.

[44] North American Co. *v.* Securities and Exchange Commission, 327 U. S. —, —; United States *v.* Darby Lumber Co., 312 U. S. 100, 114-115; Gibbons *v.* Ogden, 9 Wheat. 1, 196. For example, the provisions of Article I, § 9, forbidding the giving of preferences "by any Regulation of Commerce or Revenue to the Ports of one State over those of another"; and comparable that "No Tax or Duty shall be laid on Articles exported from any State," held applicable only to foreign commerce in Dooley *v.* United States, 182 U. S. 151.

But compare the further provision of Article I, § 9, empowering Congress to consent to laying of duties or imposts on exports by the states. See also note 47.

merce, as it has done frequently and for a great variety of reasons.[45] That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states.

This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states,[46] in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective.[47] Here both

[45] E. g., Reid *v.* Colorado, 187 U. S. 137; Champion *v.* Ames, 188 U. S. 321; Hipolite Egg Co. *v.* United States, 220 U. S. 45; Hoke *v.* United States, 227 U. S. 308; United States *v.* Darby Lumber Co., 312 U. S. 100, overruling Hammer *v.* Dagenhart, 247 U. S. 251.

[46] See cases cited in notes 29 and 43.

[47] It is perhaps impossible to point with certainty to any such explicit limitation among the various commerce clauses of the Constitution; for decision in the application of such provisions to such a combined exercise of powers is sparse. See, however, the discussion in Pennsylvania *v.* Wheeling and Belmont Bridge Co., 18 How. 421, 433 *et seq.*, relating to the clause of Article I, § 9, providing: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another."

There can be no doubt that the combined exercise of state and federal authority is limited, to some but largely undefined extent, by other constitutional prohibitions or the combined effects of more than one. Cf. text herein at note 49 *et seq.* But apart from the provision of Article I, § 9, above quoted as a possible exception, the specific limitations placed upon the commerce power or state power in relation to commerce expressly provide for joint action to be effective. Thus, this is true with reference to laying of duties on exports by the states with the consent of Congress, Art. I, § 10, notwithstanding the prohibition of such action by Congressional action alone, Art. I, § 9, and of course by state action alone, Art. I, § 10. And note the further provision that: "No State shall, without the Consent of Congress, lay any Duty of Tonnage," as to which see also note 17 above.

It was thus expressly contemplated, in some instances, that the combined exercise of the powers of Congress and the states should be free from restrictions expressly applicable to each when exerted in isolation. It is true that some of these provisions have been held applicable only to foreign commerce, e. g., the prohibition of Article I, § 10, against levy of duties on imports or exports without Congress' consent. Woodruff *v.* Parham, 8 Wall. 123; American Steel & Wire Co. *v.* Speed, 192 U. S. 500, 519, *et seq.*; but see Brown *v.* Maryland, 12 Wheat. 419. But others apply to coastwise trade indeed to trade between towns in the same state, in other words to intrastate commerce. State Tonnage Tax Cases, 12 Wall. 204, 219; and see Pennsylvania

Congress and South Carolina have acted, and in complete coordination, to sustain the tax. It is therefore reinforced by the exercise of all the power of government residing in our scheme." Clear and gross must be the evil which would nullify such an exertion, one which could arise only by exceeding beyond cavil some explicit and compelling limitation imposed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework.

In this light the argument that the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. No conceivable violation of the commerce clause, in letter or spirit, is presented. Nor is contravention of any other limitation.

A word should be added in the latter respect. Prudential has not urged grounds founded upon other constitutional provisions than the commerce clause, except in relation to the McCarran Act and then only in the event it should be construed as having effect to validate continued exaction of the tax. As has been said, it regards the statute as neither intended nor effective to "validate, authorize, or sanction state statutes which discriminate against interstate commerce." But, against the event that the Act should be taken as intended to have such an effect, it puts forward the somewhat novel contention that the statute would be in violation

---

v. Wheeling and Belmont Bridge Co., *supra*; Louisiana Pub. Ser. Comm. *v.* Texas & N. O. R. Co., 284 U. S. 125; *cf.* Williams *v.* United States, 289 U. S. 336; and see also United States *v.* The William, 28 Fed. Cas. No. 16,700.

All these provisions are intimately and expressly related to the commerce power. Notwithstanding their diversities, in application to interstate and foreign commerce or both, and also to federal and state power or their combined operation, no conclusion can be drawn from them that our constitutional policy was, or is, to give Congress and the states acting together broad powers, in some instances denied to each acting alone, in relation to foreign commerce, but to deny such authority altogether in reference to interstate commerce. Indeed the opposite conclusion is clearly indicated, both by virtue of express provision where applicable and by strong inference where not expressly forbidden.

48 The ruling is not new or only recent. "We have already seen, and the principle is undoubted, that the Act of the Legislature of Virginia conferred full authority to erect and maintain a bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. This body having, in the exercise of this power, regulated the navigation consistently with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of governments, state and federal, which, if not sufficient, certainly none can be found in our system of government." Pennsylvania *v.* Wheeling and Belmont Bridge Co., 18 How. 421, 430. Compare this with Mr. Justice McLean's dissenting view, note 34 above.

of the due process clause of the Fifth Amendment; of the first clause of Article I, § 8, requiring that "all Duties, Imposts and Excises shall be uniform throughout the United States"; of Article I, § 1, "which requires legislation to be enacted by Congress"; and, apparently of the Tenth Amendment, "as a violation of the states' power to tax for purposes of raising revenue *for their own use*, which power is vested exclusively in the states."[49]

These arguments may be summarily disposed of. As for the due process contention, it was settled by a long line of authorities prior to the *South-Eastern* decision, that the similar provision of the Fourteenth Amendment, as well as that requiring equal protection of the laws, does not forbid the states to lay and collect such a tax as South Carolina's.[50] Certainly the Fifth Amendment does not more narrowly confine the power of Congress; nor do it and the Fourteenth taken together accomplish such a restriction upon the coordinated exercise of power by the Congress and the states.

The argument grounded upon the first clause of Article I, §8, requiring that excises shall be uniform throughout the United States, identifies the state exaction with the laying of an excise by Congress, to which alone the limitation applies. This is done on the theory that no more has occurred than that Congress has "adopted" the tax as its own, a conception which obviously ignores the state's exercise of its own power and, furthermore, seeks to restrict the coordinated exercise of federal and state authority

[49] The contentions are stated in appellant's brief as follows: "If it be assumed that the McCarran-Ferguson Act is an adoption by Congress of legislation of the states, then the Act is unconstitutional (1) as a violation of the due process clause of Fifth Amendment to the Constitution; (2) as a violation of Article I, Section 8, Clause 1 of the Constitution which requires that excises shall be uniform throughout the United States in the exercise by Congress of its taxing power, (3) as a violation of Article I, Section 1 of the Constitution which requires legislation to be enacted by Congress, and (4) as a violation of the states' power to tax for purposes of raising revenue *for their own use*, which power is vested exclusively in the states."

[50] "... It has never been held that a State may not exact from a foreign insurance corporation as a condition to admission to do business the payment of a tax measured by the business done within its borders." Lincoln National Life Ins. Co. *v.* Reid, 325 U. S. 673, 677. See Ducat *v.* Chicago, 10 Wall. 410; Fire Assn. of Philadelphia *v.* New York, 119 U. S. 110; Hanover Fire Ins. Co. *v.* Harding, 272 U. S. 494; Continental Assurance Co. *v.* Tennessee, 311 U. S. 5. See discussion in Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 101 ff.

by a limitation applicable only to the federal taxing power when it is exerted without reference to any state action.[51] The same observation applies also to the contention based on Article I, [illegible]. The final contention that to sustain the Act, and thus the tax, would be an invasion of the state's own power of taxation is so clearly lacking in merit as to call for no comment other than to point out that, by juxtaposition with the contentions discussed in the preceding paragraph, the effect would be at one stroke to bring the Act into collision with limitations operative only upon the federal power and at the same time to nullify state authority.

No such anomalous consequence follows from the division of legislative power into the respective spheres of federal and state authority. There are limitations applicable to each of these separately and some to their coordinated exercise. But neither the former nor the latter are to be found merely in the fact that the authority is thus divided. Such a conception would reduce the joint exercise of power by Congress and the states to achieve common ends in the regulation of our society below the effective range of either power separately exerted, without basis in specific constitutional limitation or otherwise than in the division itself.[52] We know of no grounding, in either constitutional experience or spirit, for such a restriction. For great reasons of policy and history not now necessary to restate, these great powers were separated. They were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion.[53]

We have considered appellant's other contentions, including the suggestion that the McCarran Act, construed as we have

[51] The related contention that Congress' "adoption" of South Carolina's statute amounts to an unconstitutional delegation of Congress' legislative power to the states obviously confuses Congress' power to legislate with its power to consent to state legislation. They are not identical, though exercised in the same formal manner. See Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 327.

[52] "It would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them." Ribble, 211. And see [illegible]

[53] Cf. note 47.

terpreted it and thus given effect, would involve an unconstitutional delegation by Congress of its power to the states. For reasons already set forth and others, including the fact that no instance of delegation is involved on the facts, we find them without merit.

The judgment accordingly is

Affirmed.

Mr. Justice BLACK concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of this case.